In the instant case the learned magistrate on the evidence before him found that the appellant had on several occasions asked the respondent to give him more time to pay and not to present the cheque to the bank for payment, and that when it was finally presented for payment was dishonoured with the words "Refer to drawer" which clearly indicated that the appellant had insufficient effects in his bankers' hands and had made no arrangement with them for the overdraft to meet the amount drawn on the said cheque. The appellant's last and final ground of appeal must therefore also fail. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Hussain Hassan & Co.; V. K. Palasuntharam.*

UNITED OVERSEAS BANK LTD. v. CHUNG KHIAW BANK LTD.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. & Chua J.) July 10, 1968]

[Singapore — Federal Court Civil Appeal No. Y8 of 1968]

Practice and Procedure — Order made on originating summons where no appearance was made — Application to set aside order — Locus Standi of applicants — Whether order is ex parte order within O. LIII r. 4(1) of R.S.C.

Practice and Procedure — Order made on originating summons — Summons not served on necessary party — Whether a nullity or irregularity — Whether party not served entitled ex debito justitiae to set aside order — Whether they are persons affected by the order — Inherent jurisdiction of court to set aside order.

Registration of Deeds — Applicant attaching interest in immovable property and registering same in Registry of Deeds — Respondent obtaining an order declaring them as mortgagees — Non-registration of order by respondent — Priority — Registration of Deeds Ordinance, (Cap. 255), s. 7(3).

This was an appeal from the decision of Winslow J. ([1968] 1 M.L.J. 291) dismissing an application by the appellants by way of summons-in-chambers to set aside an order made in an originating summons.

The facts leading to this appeal were as follows:— On October 27, 1966, the appellants obtained an order attaching the interest of one Tay Soo Tong in certain immovable properties (hereinafter referred to as 'the said property'), to satisfy a judgment by them against him. This order was registered against the said properties the next day.

On November 14, 1966, the respondents, by way of an originating summons (which was served on Tay Soo Tong by substituted service to which he did not enter an appearance) obtained an order, *inter alia*, declaring them to be the legal mortgagees of the said properties and giving them liberty to sell the said properties. At the hearing of this originating summons no mention was made of the order obtained by the appellants.

The appellants then took out a summons-in-chambers *inter alia* to set aside the order of court obtained by the respondents under O. XXVIII r. 15 and O. LIII r. 4(1) of the Rules of the Supreme Court. The respondents objected to the application, *inter alia*, on the ground that the appellants, not being parties to the originating summons, had no *locus standi* and therefore had to obtain leave of the court before they could intervene in the matter. Winslow J. dismissed the application on the ground that an order made in an originating summons to which a defendant was required to enter an appearance but failed to do was an order under in default of appearance which could not governed by O. XIII r. 14 and could not be regarded as an *ex parte* order under O. LIII r. 4(1). The judge was further of the view that United Overseas Bank, Ltd. were "not persons affected by the order of court of November 14, 1966, in the sense that they were necessary parties to it because they suffered no injury directly under it."

Held, allowing the appeal: (1) a judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and an order made on such hearing is an *ex parte* order within the terms of O. LIII r. 4(1);

(2) as the respondents had not registered the memorandum of charge before the registration of the order of attachment by the appellants, the latter had, by reason of section 7(3) of the Registration of Deeds Ordinance, obtained priority over them. Therefore the appellants were an essential party to the originating summons and were clearly persons affected by the order made *ex parte* within the meaning of O. LIII r. 4(1);

(3) the order made on the originating summons was a nullity and the appellants who are affected by it were entitled *ex debito justitiae* to have it set aside. *Craig* v. *Kanseen* (3) followed.

Cases referred to:—

(1) *Jacques* v. *Harrison* (1884), L R. 12 Q.B.D. 165.

(2) *Fung Sin Wa & Ors.* v. *Moi Chan Hen* (1897), 4 S.S.L.R. 175.

(3) *Craig* v. *Kanseen* [1943] 1 All E.R. 108.

FEDERAL COURT.

G. Starforth Hill (*K. S. Chung* with him) for the appellants.

David T. See (*Francis Teoh Ong Cheh* with him) for the respondents.

Cur. Adv. Vult.

Chua J. (delivering the judgment of the court): The circumstances which give rise to this appeal are as follows:—

The appellants, United Overseas Bank, Ltd., sued Tay Soo Tong in Suit No. 2189 of 1965 and obtained a judgment for $378,267.31 on the 16th June, 1966.

On the 22nd September, 1966, the respondents in this appeal, Chung Khiaw Bank, Ltd., took out an Originating Summons No. 239 of 1966 against the same Tay Soo Tong and an order for substituted service was obtained against him and the originating summons was not heard until the 14th November, 1966.

In the meanwhile United Overseas Bank, Ltd. took out a writ of seizure and sale and an order was obtained on the 27th October, 1966, attaching the interest of Tay Soo Tong in certain immovable properties (hereinafter referred to as "the said properties") and on the 28th October,

1966, the order of attachment was registered against the said properties.

At the hearing of the Originating Summons No. 239 of 1966, Tay Soo Tong, not having entered an appearance, the Chung Khiaw Bank, Ltd. obtained an order, *inter alia.*

(a) declaring them to be the legal mortgagee of the said properties;

(b) giving them liberty to sell the said properties out of court;

(c) directing the net proceeds of sale to be paid to them in satisfaction or part satisfaction of the amount due and owing by Tay Soo Tong to them.

At the hearing no mention was made of the order of attachment of the 27th October, 1966, obtained by the United Overseas Bank, Ltd. and registered against the said properties on the 28th October, 1966.

Between the 15th November, 1966, and 10th March, 1967, correspondence passed between the solicitors for United Overseas Bank, Ltd. and the Sheriff of Singapore regarding the sale of the said properties that had been attached. The Sheriff tried to bring the United Overseas Bank, Ltd. and the Chung Khiaw Bank, Ltd. to some sort of understanding as to the disposal of the said properties but without success.

On the 23rd January, 1967, the Chung Khiaw Bank, Ltd. registered the order obtained by them on the 14th November, 1966, at the Registry of Deeds against the said properties.

On the 18th March, 1967, the Sheriff applied in summons-in-chambers entered No. 441 of 1967 in Suit No. 2180 of 1965 for, *inter alia,* liberty to proceed with the sale of the said properties pursuant to the writ of seizure and sale dated the 25th October, 1966. The Sheriff in his affidavit said that he believed that there was a question of priority as between the United Overseas Bank, Ltd. and the Chung Khiaw Bank, Ltd. in regard to the said properties. Both the banks were served.

The Sheriff's summons was heard on the 29th May, 1967, by Winslow J., who made no order on the application.

On the 25th October, 1967, the United Overseas Bank, Ltd. took out a summons-in-chambers entered No. 2393 of 1967 in Originating Summons No. 239 of 1966 seeking an order:—

(1) that a copy of the summons-in-chambers and copies of all affidavits in support thereof be served on the Sheriff of Singapore;

(2) that the Sheriff of Singapore be made a party to the said originating summons;

(3) that the order of court dated the 14th November, 1966, made in the originating summons be set aside and that the Registrar of Deeds do rectify the Register of Deeds and cancel the entry made on the 23rd January, 1967, in the said register of the registration of the order of court dated the 14th November, 1966, made in the originating summons;

(4) for other consequential orders.

This application came before Winslow J. in open court. Counsel for the Chung Khiaw Bank, Ltd. raised preliminary objections to the application on various grounds which were summarised by the judge in his judgment as follows:—

> "(i) that the applicants were total strangers to the originating summons in question and accordingly were not parties to it and should therefore obtain the leave of the court if they intended to intervene;
>
> (ii) that the applicants have no *locus standi* in the matter at all and should apply for leave to intervene on the principles laid down in *Jacques* v. *Harrison* [1] as to the modes open by which a stranger to an action who is injuriously affected through any judgment suffered by a defendant by default can set a judgment aside;
>
> (iii) that the grounds for setting aside the order of court in question have not been set out in the summons itself as required by O. LXIII r. 3."

Counsel for the United Overseas Bank, Ltd. submitted that the court should assume that the United Overseas Bank, Ltd. had a *locus standi* because they were persons injuriously affected and said that he was not attacking the order of court in question for irregularity and therefore the principles laid down in *Jacques* v. *Harrison* did not apply. Reliance was placed mainly on O. LIII r. 4(1) on the grounds that the United Overseas Bank, Ltd. were persons who had been affected by the order and had not been served, as they should have been, and that such failure vitiated the order made.

O. LIII r. 4(1) reads:—

> "Any order made *ex parte* may be varied or set aside on application, by any person affected by it, to a judge, on such terms as to costs or otherwise as to the judge seem fit."

The judge disagreed with this contention and took the view that an order made in an originating summons to which a defendant is required to enter an appearance which he fails to do is an order in default of appearance which is governed by O. XIII r. 14 and cannot be regarded as an *ex parte* order under O. LIII r. 4(1). The judge was further of the view that United Overseas Bank, Ltd. were "not persons affected by the order of court of the 14th November, 1966, in the sense that they were necessary parties to it because they suffered no injury directly under it."

The judge held that the preliminary objections to the application succeeded and he dismissed the application with costs.

It is against this order that the United Overseas Bank, Ltd. now appeal.

Counsel for the appellants' contention is that the United Overseas Bank, Ltd. by registering the order of attachment on the 28th October, 1966, have priority in title over the Chung Khiaw Bank, Ltd. to the properties of Tay Soo Tong and consequently the United Overseas Bank, Ltd. were an essential party to the originating summons of the Chung Khiaw Bank, Ltd. and since the United Overseas Bank, Ltd. were not served the order made on the originating summons was a nullity and the court in its inherent jurisdiction should set it aside *ex debito justitiae*. Counsel for the appellants further contends that the judge was wrong in deciding that the order made on the originating summons was not an *ex parte* order.

The first question for consideration is whether or not the order made on the originating summons was an *ex parte* order and comes within Order LIII rule 4(1).

The originating summons in this case was served on Tay Soo Tong by substituted service and he had made no appearance and in such a case Order LI rule 16 provides:—

> "Where any party who had been duly served fails to attend at the time appointed for the hearing, the judge may proceed *ex parte*, if he thinks it expedient to do so and may require such evidence of service as he thinks fit."

It is clear then that a judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and an order made on such a hearing is an *ex parte* order within the terms of Order LIII rule 4(1).

The question then arises as to whether the appellants were persons affected by the order made on the 14th November, 1966.

Counsel for the appellants submits that as the appellants were necessary parties to the originating summons they were affected parties.

Now, what is the legal effect of the registration of an order of attachment against the properties attached?

The Registration of Deeds Ordinance after providing in section 2 that the expression "order of court" means, *inter alia*, "writ of execution" and that the expression "assurance" includes, *inter alia*, "memorandum of charge" and "order of court" provides in section 7(1) that "where any lien or charge on any lands is claimed . . . . by reason of any deposit of title or otherwise, a memorandum of such lien or charge, signed by person against whom such lien or charge is claimed, may be provisionally registered on presentation by any person claiming to be interested therein", and, after providing the mode of registration in sub-section (2), sub-section (3) provides that "no such lien or charge shall have any effect or priority as against any assurance for valuable consideration unless and until a memorandum thereof has been registered in accordance with this Ordinance", and by section 15(1) it is provided that ". . . . all instruments . . . . entitled to be registered under this Ordinance shall have priority according to the date of registration thereof and not according to the date of such instruments or of the execution thereof "and sub-section (4) of section 15 provides that "all priorities given by this Ordinance shall have full effect in all courts. . . ."

The question arises whether an assurance for valuable consideration includes a writ of execution. In the case of *Fung Sin Wa & Ors.* v. *Moi Chan Hen*,[2] Leach J. held that an assurance for valuable consideration included a writ of execution. The case went to appeal and the Court of Appeal affirmed the judgment of Leach J. In our view that decision is still good law.

Once an order of attachment is made on a writ of execution and the order is duly registered it has priority over other assurances for valuable consideration registered thereafter by virtue of the provisions of the Ordinance.

In the present case the Chung Khiaw Bank, Ltd. have failed to register the memorandum of charge before the registration by the appellants of the order of attachment and the appellants have therefore obtained priority over them and that being the case it seems to us that the appellants were an essential party to the originating summons and clearly were persons affected by the order made *ex parte* within the meaning of Order LIII rule 4(1).

It further appears to us that the order made on the originating summons is a nullity and the appellants who are affected by it are entitled *ex debito justitiae* to have it set aside (see *Craig* v. *Kanseen*,[3]).

For these reasons we think this appeal should be allowed and that the appellants should have the orders prayed for in prayers (3) and (4) of their application. They are also entitled to costs here and in the court below.

Appeal allowed.

Solicitors: *Chung & Co.; R. C. H. Lim & Co.*